

commercial availability of navigation devices,⁴⁴ program access, leased access,⁴⁵ program carriage and must carry obligations were adopted only after extensive debate and specific legislative findings.⁴⁶ While this list demonstrates that Congress clearly has exercised authority over the cable industry in the past, it is equally clear that Congress has never imposed unbundling and open access conditions on cable operators.

Instead of the sweeping “principles” and themes that AOL seeks to identify, however, Title VI imposes several discrete and tailored obligations that are designed to address specific problems Congress identified through the legislative process.⁴⁷ Although at times these requirements affect the services provided over cable systems, Congress has never forced cable operators to become

⁴⁴ 47 U.S.C. § 549. The Commission’s rules implemented the legislative directive. See 47 C.F.R. § 76.1200 et seq.

⁴⁵ 47 U.S.C. § 532(c). The Commission implemented the statute. 47 C.F.R. § 76.970. Significantly, cable systems were not even subject to mandatory access requirements for video programming until Congress specifically enacted such a requirement in 1984. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549 (Oct. 30, 1984), codified at 47 U.S.C. §§ 601 et seq. See also H.R. Rep. No.934, 98th Cong., 2d Sess. (1984) at 36 (explaining intent to remedy lack of statutory authority found in FCC v. Midwest Video Corp., 439 U.S. 1063 (1979)). The leased access requirements themselves are express and narrow statutory exceptions to the ban on common carrier regulation of cable systems, and specifically preclude the imposition of additional such obligations by “[a]ny Federal agency, State, or franchising authority” by rule or as a condition of obtaining or renewing a cable franchise. 47 U.S.C. § 532(b)(2), (3). Other media of mass communications are not subject to access requirements, either because of the lack of statutory authorization for such requirements, Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1972), or because such requirements have been held to violate the First Amendment. Miami Herald v. Tornillo, 418 U.S. 241 (1974).

⁴⁶ H.R. Rep. 102-862, 102d Cong., 2d Sess., (1992), at 91-94.

⁴⁷ The Commission has never espoused in Title VI regulation the “principles” of consumer choice and open access identified by AOL, nor has it ever asserted that such a thematic reading of the statute provides a basis for a wholesale revision of traditional cable regulation – let alone doing so out of whole cloth in a merger proceeding, as AOL and GTE suggest.

common carriers or sell transport capacity to the general public.⁴⁸ Such requirements would be irreconcilable with the historic role of cable operators as editors and creators of content, and not merely carriers.⁴⁹ There is no support whatsoever in these provisions for the imposition of unbundling requirements on the new advanced services and facilities that AT&T and TCI are seeking to provide.

On the contrary, the Communications Act specifically forbids all federal and state agencies from imposing "requirements regarding the provision or content of cable services, except as expressly provided in this subchapter."⁵⁰ By its terms, this prohibition bars all "requirements" relating to the "provision or content of cable service" -- whether those requirements are deemed "common carriage" regulation or not. Section 544(f)(1)'s direct prohibition on the imposition of any legal requirements regarding the content or provision of cable service beyond those expressly imposed by Congress thus unambiguously forecloses the claim that the existence of some statutory provisions regulating cable service somehow extends an invitation for the Commission on its own initiative to impose additional restrictions.

⁴⁸ See 47 U.S.C. § 541(c).

⁴⁹ See Turner Broadcasting, Inc. v. FCC, 114 S.Ct. 2445, 2456 (1994) ("cable programmers and cable operators engage in and transmit speech") (citing Leathers v. Medlock, 499 U.S. 439, 444) (1991)).

⁵⁰ 47 U.S.C. § 544(f)(1) (emphasis added). Requirements favoring particular programs or types of programs are particularly suspect. See Time Warner Cable v. City of New York, 943 F. Supp. 1357, 1399 n.36 (S.D.N.Y. 1996) (city's use of PEG channels to promote competition among cable systems "is at odds with the structure established by the Cable Act and violates both Section 544(f)(1) and the First Amendment insofar as such power is used to curb an operator's freedom of decisionmaking over its commercial channels.") (emphasis added). But see United Video, Inc. v. FCC, 890 F.2d 1173, 1189 (D.C. Cir. 1989) (holding that syndicated exclusivity rules could be imposed without violating section 544(f)). Whatever the merits of United Video, that decision did not create a wholesale exception for regulating cable operators in the absence of express Congressional direction.

In short, Congress could not have been clearer in foreclosing the imposition on cable systems of the obligations that AOL, MindSpring, and other ISPs and OSPs are here proposing. Congress presumably did so because it recognized -- for the reasons stated more fully below -- that a cable operator's use of its system to provide information services to its subscribers may reduce the revenues of the entrenched ISPs who offer their services over ILEC monopolies, but cannot harm competition or the interests of consumers in internet access, on-line content, or other such information service markets.

C. The Access Proposals Depend On A Series Of Unsupported Claims That Are Wrong As A Matter Of Fact, Unsound As A Matter Of Economics, and Internally Inconsistent.

The proposals of AOL and MindSpring further rest on a series of mistaken assumptions about the nature of broadband offerings in general and TCI's services in particular. Foremost, contrary to their claims, there is no "separate market" for broadband transport -- which itself is a capability that can be more readily developed and deployed by incumbent LEC monopolies. Because the market for Internet access and content services is competitive (and dominated by AOL) and because TCI does not control an essential input, TCI has no incentive or ability to interfere with its customers' access to nonaffiliated content.

Beyond that, as Professors Willig and Ordoover demonstrate, TCI has enormous economic and commercial incentives to allow its customers efficiently to reach whichever service provider the customer wants to reach. See Willig/Ordover Aff. ¶¶ 47-52. That is particularly so because -- as AOL's own expert explains -- TCI must be entitled to set whatever prices the market will bear in order to assure that it is fully compensated for the full value of the investments it has made and all the costs it incurs in providing access to other unaffiliated service providers, including

opportunity costs. In this regard, the @Home service is designed to optimize the Internet experience available to TCI's cable subscribers. Subscribers can access everything AOL subscribers get from the World Wide Web, in addition to content tailored for @Home's broadband Internet environment. If they want access to AOL's proprietary content on the broadband platform, they can get that directly from AOL through @Home under arrangements that are highly efficient. The arrangements do not "tie" two products, and there is no basis for the assertions that subscribers who use @Home to obtain high speed access to AOL are effectively "paying twice" for content.

As Professors Willig and Ordoover explain, there is thus simply no basis to regulate the conditions under which TCI should provide access to unaffiliated content. Willig/Ordoover Aff., ¶ ___. Reliance on marketplace forces and the negotiation of commercial arrangements will lead to the adoption of the most efficient arrangements to allow cable subscribers to use the services of others -- without diminishing the incentives to make the investments necessary to accelerate widespread use of cable systems to offer facilities-based residential telephone competition or otherwise jeopardizing this procompetitive merger.

1. Services Using Broadband and Narrowband are Not Separate Markets, and AOL's Claim that Broadband Services Pose Any Substantial Threat to Competition in Information Services is False and Contradicted by its Own Public Statements.

The various access proposals made by AOL, MindSpring, and others, are premised on the faulty assumption that the price for cable Internet services and other broadband offerings is not constrained by the price for narrowband services. Thus, these commenters contend, these broadband services comprise a separate "input market."⁵¹ If true -- and if TCI in fact had a natural

⁵¹ See AOL, Hausman Aff. "A" ¶ 3.

monopoly over "last-mile high-speed data transport capability"⁵² -- this claim would be potentially significant. However, as discussed infra pp. 34 - 39, TCI does not have such a monopoly. More fundamentally, there is simply no separate market for broadband and narrowband services, because narrowband lines are competitive substitutes for broadband transmission capacity.

That these products are offered in the same market is vividly confirmed by the fact on which AOL's expert Professor Hausman incongruously relies: that AOL has had a lower growth rate in areas in which @Home is offered. Indeed, the real import of Professor Hausman's affidavit appears to be that broadband access is such a superior product that all or virtually all customers will prefer it and that AOL and other ISPs or OSPs would be anticompetitively disadvantaged if marketplace forces could not assure that they could efficiently obtain broadband access for their customers at a price that reflects only its greater value. While the market does provide that very assurance -- for the reasons stated below -- it is patently not the case that broadband access is superior and would be preferred by most or even a substantial number of the existing customers of AOL or other ISPs or OSPs. Indeed, AOL's contrary assertions are refuted by common sense, marketplace experience, and the public statements of both AOL's Chairman and its General Counsel.

To be sure, cable Internet services provide data transmission speeds that far exceed those obtained over traditional narrowband phone lines. But there are a number of reasons why many customers believe it is more attractive to obtain a traditional LEC phone line for use in conjunction with dial-up ISP or OSP service than to rely on a broadband alternative. Traditional dial-up modem service is generally less expensive than TCI's @Home service, and uses existing CPE. Moreover, as AOL notes (p. 32), purchasers of TCI's @Home service cannot use that service to obtain broadband

⁵² See AOL, p. 31.

access to the Internet from remote locations. Finally, when customers choose to purchase a second phone line to use with a dial-up modem service, those customers can obviously use that second line for regular voice communication, as well as for a fax. By contrast, consumers who purchase TCI's cable Internet service instead cannot use that capability to make phone calls, hook up a fax machine, or dial up to an employer's server. In light of these features, the availability of narrowband service will significantly constrain the price of broadband, for as the price of broadband increases the demand for narrowband will also increase. Willig/Ordoover Aff. ¶ 12. That is why GTE's own affiant ultimately concedes that "narrowband can be used to provide services that are substitutes in demand for broadband when relative prices compensate for quality differences."⁵³

Moreover, actual marketplace evidence demonstrates that narrowband service is an attractive substitute to broadband services for many consumers. Although the "base of homes with access to two-way upgraded plant," which can order @Home's programming today, now stands at 10 million homes, @Home itself reports "an overall penetration rate of 2.1% at September 30, 1998." That is, only 210,000 homes out of 10 million have subscribed to cable modem service today.⁵⁴ By contrast, approximately 29,000,000 of 100,000,000 homes nationwide subscribe to some form of Internet access service.⁵⁵ Thus, while presumably 2.9 million homes in @Home's upgraded distribution area subscribe to Internet service, only 210,000 -- 1 in 15 -- have chosen to obtain that service by subscribing to @Home's cable Internet service. Mulron Aff. ¶ 2. That millions of

⁵³ See GTE, Spulber Aff., p. 10. Spulber ignores, however, that narrowband service has its own features that make it more attractive to some customers than broadband cable Internet service.

⁵⁴ http://www.home.net/corp/news/pr_981013_01.html.

⁵⁵ The Forrester Report Volume 4, Number 9, January, 1998, page 6, Figure 3.

customers nationwide who could order cable broadband Internet service today have presumably chosen to obtain Internet service over traditional narrowband phone lines rather than by subscribing to cable Internet service proves dramatically that narrowband is in fact a true demand substitute for broadband service.

Indeed, in contrast to narrowband dial-up service providers, TCI's broadband service is a fledgling. As the Transfer Application notes, the parties combined represent less than three percent of the estimated Internet customers in the United States.⁵⁶ Only about 27,000 of TCI's customers subscribe to @Home, its cable Internet service. AOL, by contrast, has 13.5 million subscribers,⁵⁷ more than *Time*, *Newsweek*, and *U.S. News and World Report* combined. AOL's most significant competitor, the Microsoft Network, has about 2 million subscribers, while AT&T WorldNet and Prodigy each have only about 1 million.

In light of this marketplace experience, it should come as no surprise that AOL's public statements assert precisely the opposite of its filings in this docket. It has publicly stated that narrowband and broadband facilities are substitutes for obtaining access to Internet services and that narrowband will be the choice of the vast majority of subscribers in this market. For example, AOL's chief executive officer, Steve Case, recently stated that, even "five years" from now "seventy-five percent of the market will be narrowband because people want it to be as easy and inexpensive as

^{56/} Transfer Application at 36.

^{57/} See, e.g., Hoover's Online News Alert: Capsule for America Online, Inc. (visited Nov. 12, 1998) <<http://www.hoovers.com/capsules/15558.html?ticker>> (noting that AOL's 13.5 million subscribers make it the world's number one provider of online services, with over 60 percent of market share); About the Company: Profile (visited Nov. 12, 1998) <<http://www.aol.com/corp/profile/>> (explaining that AOL's over 12 million members make it the largest interactive online community in the world).

possible.”⁵⁸ More recently, Case has likened broadband to what “first class is to the airlines”⁵⁹ – a premium service, but hardly a separate market.

With equal candor, AOL's Senior Vice President and General Counsel, George Vradenburg, has publicly admitted that the vast majority of AOL's customers have no need for access at speeds that are any greater than 28.8 kbps, and that AOL can take other steps (such as caching) to satisfy those customers who desire higher speed. Vradenburg likewise admitted that in contrast to available narrowband offerings, broadband involves "pretty high" installation costs, is "pretty difficult" to install, and that customer demand for these high-priced alternatives is highly price sensitive.⁶⁰

⁵⁸ See Power Lunch, Television Interview with Steve Case (CNBC broadcast, September 28, 1998).

⁵⁹ Diane Mermigas, Still a Cyber-pioneer, Electronic Media (Nov. 9, 1998), p. 32 (interview with Case).

⁶⁰ See Transcript of panel discussion between Peter Huber, moderator, and George Vradenburg, AOL, at Aspen Summit '98 (Cyberspace and the American Dream), August 25, 1998:

Peter Huber, Moderator:

How does the bandwidth situation look from AOL's perspective?

George Vradenburg, Senior Vice President and General Counsel of AOL:

Well the market is about 25 million households. It is growing about 5 to 7 million a year. Consumers are continuing to sign on in somewhat of an excess of an average 28.8 kilobits; we are seeing that most of that, virtually 99% of that, is narrowband services and so customers are continuing to sign up and they are using the service. It went from about 12 minutes a day a few years ago to 45 minutes today. So their average usage, even as the growth in the number of consumers is going up, their average use is going up. Most of the applications are E-mail or chat or access to information, and only to a limited extent do they go to the web, and to the extent that we have a little problem in performance on the web, we do a lot of caching to compensate for that. So basically in terms of the growth of our business, there's sort of not a wall that we are seeing in terms of access.

(continued...)

As against this actual empirical data, the various commenters between them have submitted only one affidavit which purports to demonstrate that "last mile broadband data transport and last mile narrowband Internet data transport are in different input markets."⁶¹ Hausman's analysis, however, is significantly flawed. First, in performing his regressions, Hausman purports to use data regarding the "price of narrowband Internet service" and the price of "broadband Internet service." However, while Hausman uses prices for @Home and Road Runner as inputs for broadband Internet, Hausman admits that the variable for narrowband Internet service includes "only the price of last mile narrowband data transport, not the price paid to the ISP."⁶²

Second, Hausman's affidavit completely fails to reveal how significant the price changes he observed were for the "narrowband Internet transport" he was examining. As a matter of standard antitrust economics, the question is quite significant. Products are said to be in different

⁶⁰ (...continued)

Peter Huber, Moderator:

No bandwidth crisis at all! This is going to be a short panel. You foresee a crisis coming or are we in good shape?

George Vradenburg:

I think we have an opportunity coming down the pike, but for all the reasons that were described by Mr. Trujillo, there are a lot of new applications that are potentially available on high-speed connections, and I think the question is whether or not those high-speed bandwidth services are going to get rolled out. We're not seeing them rolled out very quickly now. There're going very, very slowly. There's a price sensitivity. There's still a technology uncertainty. There're still penetration doubts. As I say, the cost to install is still pretty high; pretty difficult. So we're seeing a fairly slow roll out on the high-speed pipes so far.

⁶¹ See AOL, Hausman Aff., ¶ 3.

⁶² See Hausman Aff., p. 5 n.6.

markets only when significant nontransient price changes in one do not affect the demand for the other.⁶³ Without information on the significance of the price changes, Hausman's affidavit is simply of no use in assessing whether broadband and narrowband transmission constitute separate product markets. See Willig/Ordover, ¶ __.

Third, Hausman's conclusions are based on a sample of such small size (29 observations) as to be meaningless. For all these reasons, Professor Hausman's proposed market definition and assertion that services that use broadband transport are unconstrained by services using narrowband are meaningless.⁶⁴

2. Even if the Market Definition were Restricted to Broadband Transmission, TCI Would Still Not Possess a Bottleneck Monopoly.

Even if the relevant market were somehow deemed to be restricted to "broadband services," TCI would by no means be a bottleneck monopoly provider. Far from offering the "only presently available means for delivering integrated broadband services,"⁶⁵ TCI is facing competition

⁶³ See DOJ 1992 Merger Guidelines, § 1.11 (a "price increase of five percent lasting for the foreseeable future").

⁶⁴ See Willig/Ordover, ¶¶ 13-22 (explaining additional flaws in Hausman's econometric analysis).

⁶⁵ See US WEST, p. 11 (emphasis omitted).

from RBOCs,⁶⁶ CLECs,⁶⁷ ISPs,⁶⁸ wireless providers,⁶⁹ satellite companies,⁷⁰ and others, who are all investing billions of dollars to deploy broadband facilities and compete for customers. Many of these entities are aggressively building facilities on timetables similar to TCI's. Local exchange carriers in particular are aggressively deploying xDSL service to compete with cable's broadband service,⁷¹ and each industry will provide the other with a constant incentive to improve the quality, price, and availability of their respective services.

Indeed, the xDSL services that are currently being deployed and offered by the incumbent LECs alone constitute a significant and attractive commercial alternative to the Internet cable services that TCI and others offer. Although AOL and others repeatedly appear to suggest that the advantages offered by cable modem service are somehow unique, the truth is that the LECs' DSL

^{66/} See Bell Atlantic 706 NOI Comments at 2; Bell South 706 NOI Comments at i, 17-37; GTE 706 NOI Comments at 10; SBC 706 NOI Comments at i, 5-7; US West 706 NOI Comments at 8-9.

^{67/} See Allegiance Telecom 706 NOI Comments at 3; Association for Local Telecommunications Services 706 NOI Comments at 9; DSL Access Telecommunications Alliance at 4; Intermedia Communications 706 NOI Comments at 11; Northpoint Communications 706 NOI Comments at 1.

^{68/} See AOL 706 NOI Comments; MindSpring 706 NOI Comments.

^{69/} See Cellular Telecommunications Industry Association 706 NOI Comments at 13-23; Personal Communications Industry Association 706 NOI Comments at 13-23; Teligent 706 NOI Comments at 4; Wireless Communications Association International 706 NOI Comments at 3-4.

^{70/} See Skybridge 706 NOI Comments at 2, 3; Teledesic 706 NOI Comments at 2.

^{71/} See, e.g., BellSouth 706 NOI Comments at 13-14, GTE 706 NOI Comments at 10, US WEST 706 NOI Comments at 8-9, MediaOne 706 NOI Comments at 11-12, Appendix A, NCTA 706 NOI Comments at 14-17. Bell Atlantic recently announced that it was introducing its Infospeed DSL service in selected East Coast markets, including Washington, D.C., and that over seven million subscribers on the East Coast will have access to Infospeed DSL service by the end of 1999. See, e.g., Bell Atlantic Introduces Infospeed DSL Service (Oct. 5, 1998) <<http://www.ba.com/nr/1998/Oct/19981005001.html>>; Introducing Bell Atlantic Infospeed DSL, Wall Street Journal, October 5, 1998 at C26.

services also offer an "always on" connection, and the transmission speeds the LECs offer over their lines match, and may exceed, those offered by TCI. "Typically, @Home operates at speeds in the range of 1,500 to 3,000 Kbps."⁷² By contrast, both Bell Atlantic and US WEST offer services at speeds of up to 7.1 megabits per second.⁷³

Moreover, contrary to the assertions made by AOL and others, DSL offerings are no less readily available in the marketplace than are cable Internet services. US WEST today offers DSL services in dozens of communities in its service area in response to announcements by CLECs and cable companies of their advanced services deployment plans, including Phoenix, Tucson, Denver, Colorado Springs, Boulder, Minneapolis-St. Paul, Portland, Seattle, and Salt Lake City.⁷⁴ Bell Atlantic likewise has advertised that by next year it will be offering DSL services in every major city in the Washington, D.C. and Boston corridor.⁷⁵ Indeed, the LECs can upgrade any loops that are under 18,000 feet long to provide DSL services with relatively little cost, and where loops are of longer length LECs can perform targeted upgrades by deploying fiber closer to the homes and serving customers over digital loop carrier configurations.

In addition to the LECs' DSL services, companies using fixed wireless technology, such as WinStar and Teligent, are investing billions of dollars and are currently deploying nationwide wireless broadband systems that will reach the large majority of small business customers in the next

⁷² The World Wide Wait is Over, <<http://www.home.net/home/speed.html>>.

⁷³ Bell Atlantic Introduces Infospeed DSL Service to the Washington, D.C. and Pittsburgh Markets, <http://www.ba.com/nr/1998/Oct/19981005001.html>; Megabit Services General Product Descriptions, <http://www.uswest.com/com/customers/enterprise/>.

⁷⁴ www.uswest.com/com/insideusw/news/060598.html

⁷⁵ <http://www.ba.com/nr/1998/Oct/19981005001.html>

few years.⁷⁶ And satellite providers such as Hughes DirecPC currently enable users everywhere to download the World Wide Web at 400 kbps using DirecPC and will roll out a two-way high-speed service within the next year.⁷⁷

Landline CLECs are also rolling out similar advanced services. For example, RCN is currently deploying fiber to pass over 9 million homes throughout the Boston/Washington corridor and will soon deploy broadband facilities to pass millions of homes in hundreds of California communities.⁷⁸ RCN has partnered with Boston Edison and Potomac Electric Power Co. to build the fiber-optic networks in the Boston and Washington, D.C. areas and will make use of the utilities' substantial resources and fiber optic infrastructure, which can be adapted to carry these new services.⁷⁹ As part of its broadband deployment strategy, RCN is also aggressively acquiring regional ISPs so that it can quickly provide competitive Internet access services directly into customers'

^{76/} See WinStar 706 NOI Comments at 2-3; Teligent 706 NOI Comments at 5-7; Bell Atlantic 706 NOI Comments at 7; Attachment A at 3-4.

^{77/} See, e.g., AT&T 706 NOI Comments at 17; NCTA 706 NOI Comments at 19; Bell Atlantic 706 NOI Comments at 7, Attachment A at 5; US WEST 706 NOI Comments at 11.

^{78/} See, e.g., Bell Atlantic 706 NOI Comments, Attachment A at 3 (citing RCN Press Release "RCN Doubles On Net Homes Passed; Advanced Fiber Connections Up More Than 135%" (July 22, 1998)). RCN has thus far passed 122,000 homes with "advanced fiber." *Id.*

^{79/} See, e.g., Chet Dembeck, Telecom Battle Heats Up, Washington Business Journal (June 22, 1998); Hiawatha Bray, RCN to Buy Two 'Net Service Providers, Boston Globe Online (January 22, 1998) <www.boston.com>.

homes.⁸⁰ Other competitive LECs have raised \$15-20 billion to significantly expand fiber deployment for the provision of advanced services.⁸¹

Although AOL claims that the LECs have to date been slow in deploying their DSL services,⁸² until the advent of Internet cable service the LECs had little incentive to provide their own advanced services. That is precisely what competition is about. TCI's deployment of cable Internet services will spur the LECs to accelerate further their competing offerings, and to lower their prices. If customers are currently dissatisfied with existing LEC DSL offerings, that is no basis for placing obstacles before the deployment of TCI's competing services. It is instead further grounds for granting a quick approval of the requested transfers. Willig/Ordover Aff. ¶ 26.

3. TCI Has Every Incentive to Provide Subscribers with Content from Diverse Sources in the Most Efficient Way, and the Challenges to TCI's Current Arrangements are Spurious.

In all events, under any view of the foregoing facts, TCI's economic incentives are to assure that its and @Home's facilities can be efficiently deployed by their customers to access whatever other services they want to use. That is particularly so because, as AOL's expert Professor

^{80/} RCN Press Release, "RCN REPORTS RECORD GAINS IN REVENUE, NETWORK CONNECTIONS AND HOMES PASSED; Company Continues to Aggressively Build Its Northeast Customer Base and Local Broadband Fiber-Optic Network" (August 11, 1998) ("In the last 90 days, we have continued to intensify our construction schedule in all of our markets, added on-net customer connections ahead of expectations and quietly became one of the nation's top Internet service providers. At quarter's end, RCN was providing more than 400,000 people with access to this powerful new medium. Unlike other ISPs, RCN is also able to provide Internet services, including high-speed access, over its own fiber network.") <<http://www.rcn.com/investor/press/08-98/08-11-98.html>>.

^{81/} See, e.g., e.spire 706 NOI Comments at 6-7, DATA 706 NOI Comments at 7; ALTS 706 NOI Comments at 9.

⁸² See AOL Comments, pp. 52-54.

Hausman states and as AOL purports to concede, TCI must be entitled to price any "access" services at whatever price the market will bear in order to assure it recovers the full value of the investments it has made and whatever costs it incurs in assuring customers can reach other service providers, including opportunity costs. In this regard, neither AOL nor any complainant offered any factual support for their bald assertions that the arrangements through which TCI's @Home customers now access AOL are inefficient or in any way anticompetitive. In particular, there is no "tie-in," and there is no factual basis for the assertion that any customers "pay twice" for anything under these arrangements.

TCI is a new entrant in a well developed market where it is fundamentally competing not just with content providers and ISPs who use LECs' existing narrowband facilities, but also with those who now use or potentially could use the broadband facilities that are or can be deployed by others. Unlike its Internet service competitors,⁸³ however, TCI and @Home are investing in the construction and deployment of networks designed to optimize the broadband capabilities of the existing cable infrastructure for the provision of high speed Internet and online services. As part of these efforts, a unique proprietary backbone and regional data centers bring data closer to the user through caching and replication technologies, helping to overcome the delays that characterize other networks. @Home plans to expand deployment of additional data centers as TCI and other cable companies upgrade their networks for two-way communication. @Home actually activates the cable

^{83/} Notably, AOL sold its AOL Network Services backbone facilities to WorldCom in exchange for WorldCom's CompuServe subscribers. With that transaction, AOL abandoned its strategy of investing in facilities and turned its focus solely to providing content and other services. See Rajiv Chandrasekaran, AOL Shifts Its Strategic Direction, Content Focus Lauded; Deal's Price Questioned, Washington Post, Sept. 9, 1997, at C1; see also Rajiv Chandrasekaran, AOL's Man With a Mission; Marketing Whiz Bob Pittman Is Out to Make the Service a True Mass Medium, Washington Post, Feb. 15, 1998, at H1.

modems of TCI subscribers who sign up for the service and retains an ongoing role in provisioning the service to end users. @Home also provides end-to-end management of its network on a continuous basis, permitting it to address performance bottlenecks before they affect the user experience.

Significantly, @Home provides an open environment through which subscribers can reach any available content on the World Wide Web. In fact, many @Home subscribers use the service daily to access the proprietary content and services provided by America Online, the Microsoft Network, Yahoo, Amazon.com, and more. In addition to these sites, @Home also provides unique content tailored for the broadband environment through partnerships with a vast array of unaffiliated providers. These offerings feature enhanced audio, video, and interactive functionalities.

Further, to the extent that customers wanted to reach other kinds of Internet services, TCI already has economic incentives to permit that to occur in whatever form was most efficient if -- as AOL's expert states must be allowed -- TCI can charge rates that recover the full value of the investments that TCI has made and whatever costs it incurs in providing that arrangement, including opportunity costs. Neither MindSpring nor AOL has remotely shown that TCI has deployed or priced its services and facilities in a way that is inefficient or that it has refused any reasonable request that satisfies Professor Hausman's standard.

In the case of MindSpring, it is an ISP and offers no proprietary content. There is conceivable benefit to consumers in the "access" arrangements that it (and AOL) have proposed in order to enable them to provide Internet access to TCI's subscribers over TCI's cable system, for they would inherently result in an Internet access service that is inherently costlier than TCI's. That is so

because substantial investments would be required to allow TCI's cable systems to "interconnect" with multiple ISPs and because any ISP that could attract customers would require the construction of facilities to connect each of TCI's headends to the ISP's network -- but those added facilities are not needed for the TCI @Home service.

AOL offers content as well as Internet access. Neither TCI nor @Home has ever attempted to restrict its customers from accessing any available content on the World Wide Web, and TCI's @Home customers access the content and services of AOL daily. Moreover, AT&T and TCI have repeatedly stated that customers should have "easy access to the on-line content of their choice."⁸⁴ TCI and AT&T recognize that denying their customers access to online services would not be in their or their customers' best interests. "Our message to the largest OSP and all the others couldn't be more direct: if you've got a service our customers want, we want you on our system."⁸⁵

Nor is there anything anticompetitive or demonstrably inefficient about any aspect of the arrangements through which @Home customers currently reach AOL or other OSPs.⁸⁶ The

⁸⁴ Remarks of Michael Armstrong, Chairman and CEO of AT&T, before the Washington Metropolitan Cable Club (Nov. 2, 1998) ("Armstrong WMCC Remarks"); Remarks of Leo Hindery, President and Chief Operating Officer, TCI, before FCC Mergers En Banc.

⁸⁵ C. Michael Armstrong, "Telecom and Cable TV: Shared Prospects for the Communications Future," Remarks to Washington Metropolitan Cable Club (Nov. 2, 1998) ("Armstrong WMCC Remarks").

⁸⁶ In addition to these problems, AOL's proposal is fraught with difficulties and uncertainties. As set forth in the attached Affidavit of Milo Medin, Senior Vice President and Chief Technical Officer of @Home Networks, AOL overlooks a variety of problems inherent in any proposal to obtain "unbundled" access. See Affidavit of Milo Medin, attached hereto at Exhibit D. For example, IP routers are designed to forward packets based on the destination IP address. Neither the DOCSIS/MCNS standards nor the IETF standards require source address based routing. Mr. Medin points out numerous additional questions about AOL's proposal, as well, e.g. provisioning the cable modem, resolution of customer interference issues, enabling of dynamic services, and enabling of

(continued...)

primary claim that is loosely asserted in the affidavit of Professor Hausman and in some of the comments is that the existing arrangements constitute a "tie-in" of two purportedly separate products: TCI's broadband transport between customers' homes and its headends, and high-speed Internet access and enriched content provided by the @Home network. But a tie-in occurs only when a consumer is forced to obtain two products in combined form, rather than obtaining the two products separately from separate sources and combining them himself or herself.⁸⁷ There is no tie-in here because TCI@Home is a single offering, just as the provision of Home Box Office over a cable system is a single offering of video programming and not the combination of "cable transport" and a "satellite cable service."

Neither the broadband transport to the headend nor the high speed and enriched content that make up the "@Home experience" are products that are or could be offered separately to a consumer and combined by him or her to create an Internet access service. To the contrary, these are two inputs that have been designed and rolled out on a fully integrated basis. The TCI @Home cable Internet service integrates TCI's high-speed two-way infrastructure and @Home's backbone network provisioning system and local caching functionality. Each input is today useless without the other. No consumer could obtain the two purported products (i.e. the @Home and TCI inputs to the @Home service) from separate sources and combine them himself or herself to produce the equivalent of the @Home service. That establishes that there is no tie-in claim here, and that TCI's @Home is a single finished product, not a bundle of two separate tied products.

⁸⁶ (...continued)

multicasting. None of these issues can readily be addressed in the context of this proceeding.

⁸⁷ See X P. Areeda, Antitrust, § 1748a-b, pp. 242-43 (1996).

Thus, what AOL and the other ISPs purport to want is not an end to a non-existent tie-in of products that consumers could separately obtain and then combine. Rather, they want to force the technical and other developments that would enable them to obtain access to TCI's broadband facilities at the headend so that they can offer their own on-line service. That is not a tie-in claim, and there is no antitrust basis for imposing this liability on TCI given that it has no monopoly power in a relevant market. As Professor Areeda has stated:

The effect of imposing tie-in liability would thus be to force the defendant to sell component A to his rival, normally the plaintiff. As we concluded earlier, such duties to deal should, if imposed at all, be narrowly limited to certain unjustified refusals to deal by actual or potential monopolists. A broader duty to deal would have little potential to improve price and output, would be extremely difficult to administer, and would threaten much efficient vertical integration. Courts would, for example, have to figure out with which firms the defendant should deal, and at what price, quantity, and other terms.⁸⁸

These points apply with special force here. For to require TCI to provide unbundled broadband access to third party ISPs would require TCI to offer a service it does not currently provide as a cable operator – broadband transport -- which would in turn require significant additional investments by both TCI (e.g., the installation, engineering, and operation and maintenance of such equipment or facilities as are required to provide access to multiple ISPs) and the third party seeking such access (obtaining facilities between TCI's headend and an ISP's or OSP's existing transmission facilities). In addition, there would be transaction and facility costs of establishing a point of access for multiple providers of transporting data between each of TCI's headends and the transmission facilities and computers of third party providers, and of establishing an appropriate price for "unbundled data

⁸⁸ Areeda, Volume X, at 243-44.

transport.”⁸⁹ See Willig\Ordoover Aff., ¶¶ 38-52. There is no basis in law or policy for the Commission to impose such a radical regulatory burden on the cable industry under any circumstances, and certainly not in the context of this merger proceeding.

There is a more basic fallacy to AOL's complaint over the fact that to date TCI has afforded subscribers access to unaffiliated content only through its @Home cable Internet offering and not through some form of unbundled access to broadband plant. The reality is that if any provider seeks to offer content that TCI's customers would find attractive, and offers reasonable commercial terms for the arrangement, it will be in TCI's or @Home's interest voluntarily to come to agreement with the provider. As AT&T's chairman has explained, “[c]ontent is essential to make money in networks. . . . And to invite as much content over that broadband set of network facilities is absolutely, Mr. Chairman, what we want to do.”⁹⁰

There is in the end no basis for commenters' overcharged rhetoric and assertions that TCI will exert “vise-like control over the previously free-form and truly democratic medium of the Internet”⁹¹ or “exercise disproportionate power over content matters, advancing its own editorial

⁸⁹ Professor Hausman's assumption that such a price could be readily developed rests on the false premise that @Home currently pays TCI a market determined price for the broadband facilities that are used to deliver @Home's services. As described below, this assumption is incorrect. TCI pays @Home for the service, just as it pays most other suppliers of cable services. In view of the multiple and differentiated benefits that TCI receives from its relationship with @Home, moreover, there is no basis for extracting a market based transfer price for the data transport capabilities that TCI has established.

⁹⁰ See Remarks of Michael Armstrong before the Federal Communications Commission's En Banc Hearing on Telecommunications Mergers (“FCC Mergers En Banc”), transcript at 25 (Oct. 22, 1998)

⁹¹/ Consumers Union, p. 13.

perspectives and discriminating against unaffiliated ISPs with a different viewpoint.”⁹² The complete refutation to these claims is that TCI and @Home are providing open access today under what appears to be the most efficient or attractive arrangement and will have every incentive to provide other arrangements that OSPs propose if they are more efficient and also fully compensate TCI for its costs and risks. Willig\Ordover, ¶¶ 47-52 .

AOL also has a second different complaint about @Home. It complains that TCI forces @Home customers to “pay for two value-added Internet services to get to the one source of online content they want.”⁹³ As AT&T and TCI have repeatedly explained, today any @Home customer can access AOL through his or her TCP/IP connection, and AOL itself actively markets such a connection as its “bring-your-own-access” plan (“BYOA plan”).⁹⁴ Indeed, the BYOA plan offers customers substantial savings over the conventional monthly charge for AOL. For \$9.95 per month, compared with standard monthly charge of \$21.95, BYOA enables any customer, including @Home customers, to gain “unlimited access to thousands of unique AOL features.”⁹⁵ There is little difference between customers who choose to access AOL through a separately-purchased ISP such as MSN, MindSpring, or Erols’ Internet, and customers who use AOL’s BYOA plan in connection with @Home. AOL’s concerns about subscribers that must “pay twice” also rings hollow in light of

^{92/} MindSpring, p.14.

^{93/} AOL, p. 14 n.29.

^{94/} See “Top 20 AOL Member Questions,” <<http://aol.com/nethelp/top20memberquestions.html>>.

^{95/} Id. (AOL’s BYOA plan is one of “5 pricing plans that provide access to AOL and the Internet. These are designed to appeal to the broadest range of consumers. Of the five offered plans, we hope that one of them will fit your individual needs.”). AOL’s BYOA plan presumably saves AOL money because it allows the company to provide its services to a customer without adding traffic to the backbone facilities it leases from MCI WorldCom.

the fact that its BYOA customers can often obtain portal and e-mail functions from their ISP but must purchase these functionalities again from AOL itself in order to gain access to AOL's proprietary content. AOL refuses to sell dial-up access without its front-end advertising screens and other content.

Thus, there is only one possible basis for AOL's claim that its customers who reach it through @Home are "paying twice" for something. That is the fact that the monthly charge for @Home entitles the subscriber to obtain both the proprietary content of @Home and its Internet access services, so AOL contends, customers who obtain @Home solely to obtain high speed Internet access are paying more than they should because they "pay" for content they do not want or use. This claim ignores the economic realities of the service. In particular, it ignores that the provision of content allows @Home to sell advertising and use the revenues to offset its network and transmission costs. If content were not provided and advertising revenues were not realized, that would, all other things being equal, require @Home to recover these costs from other sources (or reduce its network and transmission costs). Mulron Aff., ¶¶ 3-4. That would put upward pressure on TCI's charges for @Home. Thus, as Professors Willig and Ordovery explain, rather than increase rates for @Home, the provision of content may reduce them. Willig/Ordovery Aff. ¶¶ 43-44.

As AT&T's chairman explained in a recent speech, "AOL or any other OSP can actually gain revenue by our customers reaching their services via our broadband network. That means enhanced advertising, e-commerce and other advantages. It's a win-win situation."⁹⁶ AOL and other OSPs, however, are not content with a "win-win" world. They want the Commission to treat TCI like a common carrier and force TCI to provide unbundled access to its broadband cable

^{96/} Armstrong WMCC Remarks.

facilities, a solution that will greatly reduce AT&T's and TCI's economic incentives to upgrade TCI's network in the first place. The Commission cannot, and should not, choose this "lose-lose" route.

4. The Proposed Access Requirements are Infeasible and Unrealistic.

The arguments of AOL and MindSpring are fallacious for another reason. They could not be implemented in ways that protect their purported interests without requiring the Commission to engage in rate regulation that all concede would be improper and that would further jeopardize the economic basis for the AT&T-TCI merger.

In this regard, AOL's expert, Professor Hausman, states, correctly, that if an unbundling obligation were imposed on TCI, it would have to be permitted to charge a price to the ISPs that compensated it for the full value of its broadband investment and the costs incurred as a result of providing the "access" arrangement, including the opportunity costs of not being to provide the ISP or OSP itself. Otherwise, the unbundling duty would impede the incentives for investments that are profoundly beneficial to consumers.

However, Professor Hausman believes that there would be no social or other costs in imposing the unbundling duty because he believes @Home is already "paying" TCI a price for access that has been established under the foregoing standard and that all that would be required is for that same price to be charged to AOL or other OSPs. This is just wrong. The relationship between @Home and TCI is decidedly not like that an ISP has with an ILEC or other common carrier. To begin with, @Home does not "pay a fee to the local cable provider that provides last mile high speed transport."⁹⁷ In areas where it is available, cable subscribers order @Home like they

^{97/} @Home also shares revenues from premium areas on the service. AOL clearly does not contemplate such a "programmer" relationship with TCI.

would any other cable service from the operator. The cable operator controls pricing, and remits to @Home 35 percent of the monthly subscription fee. The cable operator retains not only 65% of its price, but all the benefits of having the direct customer relationship. As explained above, it is the desire to capture those benefits that is at the heart of AOL's claim, not a desire to obtain "access" to cable facilities at a particular point. Indeed, this relationship is of immense value to any cable provider, for providing cable Internet services to subscribers both broadens and strengthens the bond with that customer and enhances the ability to attract that customer for the cable system's future local telephone service. In this regard, the enthusiasm of the incumbent LECs for the AOL proposal is a product of their overriding interest in weakening AT&T\TCI as prospective competitors with the LECs' monopolies.

That underscores why the appropriate model for these services is not the common carrier "transport" analogy cited by AOL, but cable programming plain and simple.⁹⁸ AOL's intentions are obviously not to replicate the @Home approach, but to pick out an entirely imaginary "underlying transport" functionality that can be commoditized and sold piecemeal. But the @Home relationship with TCI cannot serve as a model for this proposal.

At the same time, AOL does assert (p. 34) that it is not "call[ing] for price regulation of last-mile high speed data transport." AOL's affiant likewise asserts that "TCI could still charge the (unregulated) profit maximizing price for last mile high speed data transport over its network." Hausman Aff., ¶ 16. If this were literally true, imposition of the access requirements could serve no conceivable objective since commercial negotiations and arrangements would assure that the most efficient and appropriate access arrangements. AT&T and TCI can only conclude that AOL's

^{98/} Hausman Declaration "B" at 9.

disavowal of rate regulation cannot be taken seriously. Indeed, the other ISP who urges the same condition -- MindSpring -- candidly states that it is seeking access to the broadband transport facilities of TCI and other cable systems at rates and terms and conditions that are cost-based and just, reasonable, and appropriate.⁹⁹

Under any scenario, the adoption of the proposed regulations would impose burdens on the merged AT&T-TCI and threats of protracted proceedings and rate regulation that would impair their incentive and ability to undertake rapidly the investments required to upgrade TCI's cable facilities to allow them to provide high speed Internet and telecommunications services alike. The threat would be most direct and destructive in the case of MindSpring's candid call for actual "cost of service" rate regulations. The expenses that would have to be incurred to allocate fixed and other cable costs and to litigate appropriate rates would be immense, and the mere possibility that rates would be set at levels that do not fully compensate AT&T-TCI for the investments they make will operate as a major inhibition. Willig/Ordover Aff. ¶____. That is presumably why Congress squarely foreclosed the imposition of such conditions on cable systems. They simply serve no purpose in view of the fact that services offered over cable systems directly compete with those offered over the narrowband as well as broadband facilities of ILEC monopolies.

Indeed, to advance the stated interests of the ISPs and LECs, the Commission would have to assert authority over both the price that TCI would charge for its so-called last mile

⁹⁹ See MindSpring, p. 17. Other commenters likewise clearly reveal their regulatory aspirations. SBC suggests the Commission "adopt a national range of discount percentages to be applied to local retail rates for cable services." SBC, p. 15 n.50. AT&T would then be required to offer "high-speed data transport capabilities . . . at wholesale prices . . .". *Id.*, pp. 15-16. U S WEST seeks unbundled access under TELRIC pricing. U S WEST, p. 29. EchoStar calls for "reasonable" terms and conditions. EchoStar, p. 7.

"transport" as well as the rate that TCI and @Home would charge for Internet access, or AOL's stated goal could not be achieved. Willig/Ordoover ¶ __. As for TCI's rate for transport, the point should be clear: unless TCI's rate was regulated by the Commission, TCI could be claimed to have effectively denied access to unaffiliated ISPs and OSPs by setting a rate that was "too high." In addition, regulation of TCI's rate for "transport" would not be enough. In order to ensure "true parity" between AOL and @Home, the Commission would have to require @Home to impute to itself the full cost of the transport rate that TCI charged AOL and reflect it in the prices for the Internet access and on-line services that TCI provides over those facilities. In particular, parties would claim that the rates for Internet access and on-line services would exceed the imputed cost of the broadband cable transport plus some measure of costs of the other components of these information services.¹⁰⁰

Thus, far from promoting the widespread availability of advanced services, subjecting new entrants such as TCI to the unbundling and other obligations that Congress imposed on the incumbent LECs would thwart the Act's competitive goals. Congress understood that cable companies today offer the best hope of providing competitive local exchange services to a broad number of residential customers over facilities that bypass the incumbent LECs' bottleneck facilities.¹⁰¹ In order to do so, however, cable providers will be required to invest billions of dollars to upgrade their networks -- an economic and technological risk that cable companies will not undertake if they

¹⁰⁰ AOL seeks to avoid these fundamental facts by asserting that "@Home currently pays a fee to the local cable provider that provides last mile high speed transport," and argues that the Commission should simply require TCI to "charge AOL similar prices." Hausman, Aff. B, ¶ 16. As explained above (see p. 48, supra), that is incorrect.

¹⁰¹ Joint Explanatory Statement, p. 148.

would then have to provide unbundled access to those upgraded facilities to third parties whose business plans did not include the development and deployment of advanced infrastructure at regulated and potentially noncompensatory rates. In the two and a half year period since the 1996 Act was passed, there has been virtually no erosion in the monopoly power of the incumbent LECs. The last thing the Commission should do now is subject the most promising facilities-based competitive providers of Internet access to residential consumers to common carriage regulation -- much less to regulations that were designed for incumbent monopolists.

Significant risks attend AT&T and TCI's commitment to making the substantial investments that the nationwide deployment of competitive local telephone networks and broadband facilities will require. One of the potential benefits of undertaking this risk, however, is that the merged company will be able to compete for customers on the basis of the services and functionalities that the new network will make possible. Forcing AT&T and TCI to accept common carrier regulation for their broadband plant from day one will create a substantial disincentive to their making the network investments that will enable facilities-based competitive local telephone service as well as advanced cable and other services to residential customers. That, in turn, would jeopardize the economic underpinnings of the merger.

IV. THE TERMS OF THE COMMUNICATIONS ACT PROHIBIT THE IMPOSITION OF CONDITIONS THAT WOULD SUBJECT TCI'S CABLE SYSTEMS TO ANY OF THE "ADDITIONAL OBLIGATIONS" THAT APPLY TO INCUMBENT LECS UNDER SECTION 251(c).

As shown in Section III, supra, there is no legal or policy basis for subjecting TCI's cable services to Title II obligations, as AOL and MindSpring urge. However, in addition to endorsing AOL's and MindSpring's claims, the LECs and two of AT&T's interexchange competitors also claim that the Commission should declare that when AT&T-TCI begins to provide telephony,

it will be an "incumbent LEC" (or at least should be subject to the same requirements that Section 251(c) of the Communications Act imposes on incumbent LECs).¹⁰² This claim is likewise one that should be raised, if at all, only in a generic proceeding, for any issues concerning how cable systems that offer telephone service should be regulated are industry-wide questions that should be resolved on an industry-wide basis. Moreover, because the merged entity will not be able to offer telephony until it completes the necessary upgrades, there is no basis today even to consider in this proceeding whether to impose the obligations these commenters seek.

In all events, this claim is squarely foreclosed by the terms of the Communications Act and the Commission's rules alike. They provide that cable systems cannot be subject to any common carrier regulations unless those systems provide telecommunications services. Even then, their telecommunications services will be subject only to the obligations of Sections 251(a) and (b), and not those of Section 251(c).

First, the requirements of Title II, and Section 251 in particular, do not apply to firms that do not provide "telecommunications services." The Communications Act states that a provider of a telecommunications services "shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services," 47 U.S.C. § 153(44), and the Communications Act defines "telecommunications services" as the "offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46). "Telecommunications" is in turn defined as "the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information." 47 U.S.C. § 153(43).

¹⁰² See, e.g., GTE, pp. 6-7; MCI/WorldCom, p. 13; Qwest, pp. 15-16.